

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

“NOT FOR PUBLICATION”

No. 06-307C  
(Filed: June 8, 2006)

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ABHE & SVOBODA, INC.	)
	)
Plaintiff,	)
	)
v.	)
	)
UNITED STATES,	)
	)
Defendant,	)
	)
OCCI, INC.,	)
	)
Intervening-Defendant.	)

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ORDER

Pending before the court is Plaintiff’s Motion for Additional Discovery, filed on May 19, 2006 regarding aspects of the solicitation that is the subject of this bid protest. In the motion, plaintiff, Abhe & Svoboda, Inc., requests that the government be ordered to produce additional documents beyond those that have been supplied in the administrative record filed in this case on May 5, 2006, and that it be allowed depose both of the contracting officers with the Corps of Engineers who have been involved with the solicitation. In response, the government has acknowledged that additional documents should be made part of the administrative record, and on June 2, 2006, an order was entered by the court allowing the filing of a proffered 480-page supplement to the administrative record. The government otherwise opposes any discovery, claiming that Abhe & Svoboda has failed to demonstrate that the requested depositions are relevant and material to Abhe & Svoboda’s claims in this pre-award bid protest. Defendant’s Response to Plaintiff’s Motion for Additional Discovery at 3-6. The intervenor chose to rely on the arguments made by the government.

Plaintiff’s request for production of additional documents appears to be mooted by the filing of the supplemental administrative record by the government. The dispute at this juncture focuses on whether depositions of the two contracting officers are necessary to address actions by those officers and others at the Corps, which actions allegedly are not reflected in a meaningful way in the administrative record as supplemented. When an explanation of a contracting officer’s decision is required for meaningful judicial review, a reviewing court has the power, and in some cases may have the obligation, to require such an explanation. *Impresa*

*Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1338 (Fed. Cir. 2001) (citing *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990); *Camp v. Pitts*, 411 U.S. 138, 142-43 (1973); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)). The agency's decision is entitled to a presumption of regularity, which may be rebutted by record evidence "suggesting that the agency decision is arbitrary and capricious." *Impresa Construzioni*, 238 F.3d at 1338. As a matter of general administrative law, the standard course for supplementing an inadequate record is to remand the agency action under review to the agency. However, in bid protest cases, providing for a deposition of the contracting officer may prove far more efficient. *Id.* at 1339. Such depositions may enable the court to satisfy its statutory duty to "give 'due regard' to 'the need for expeditious resolution of the action.'" *Bannum, Inc. v. United States*, 404 F.3d, 1346, 1356 (Fed. Cir. 2005) (quoting 28 U.S.C. § 1491(b)(3)).

Abhe & Svoboda has satisfied its burden of showing good cause to obtain limited discovery by way of the depositions of the contracting officers. The Corps' solicitation has taken an unusual procedural course. On July 1, 2005, the Corps issued a solicitation of proposals for the Tainter Gate Modification at the Tuttle Creek Dam and Reservoir, Manhattan, Kansas. AR 52. Five offerors provided proposals. The protestor and the intervenor were included among those making proposals. The five proposals were assessed by a Technical Evaluation Committee and a Price Evaluation Team, both of which issued reports dated August 31, 2005. AR 348-50 (Technical Evaluation Committee), 232-38 (Price Evaluation Team). One offeror then was selected for an award of the contract by the contracting officer, acting as the Source Selection Authority. The contracting officer acted at the direction of the Project Manager, AR 529, and indeed the award was made by the contracting officer based wholly on the Project Manager's direction; at the time, the contracting officer had not read the technical evaluations nor had he read the source selection document. *Id.* Thereafter, the Corps set aside the award based upon a "determin[ation] that a flaw in the procurement process [had] occurred." AR 703. However, at that point, a new solicitation was not issued. Instead, a new contracting officer was appointed and the five proposals that previously had been submitted were again evaluated. The administrative record as supplemented does not appear to disclose how the reevaluation was conducted nor does it indicate the extent to which the offerors were asked or allowed to supplement or amend their proposals. *See* AR 529 ¶ 5. In addition, it appears that the same Project Manager may remain in place. In these circumstances, the effectiveness of the "corrective action," AR 703, taken by the Corps might reasonably be questioned.

The government seeks to obviate the need for depositions by offering to have the two contracting officers prepare affidavits or declarations that address the relevant circumstances and actions. Plaintiff protests that this form of supplementation would not delve sufficiently deeply into all of the attendant facts. The court agrees and authorizes plaintiff's counsel to depose each of the two contracting officers for a maximum of three hours apiece. Such depositions shall be conducted on or before June 20, 2006.

In addition, the parties shall provide the court with a Joint Status Report on or before June 23, 2006, proposing a plan and schedule for cross-motions on, and briefing of, the merits. The court requests that the parties also provide a courtesy copy of this report via facsimile to chambers.

It is so **ORDERED**.

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Charles F. Lettow  
Judge